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No. 667

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

BOWATERS SOUTHERN PAPER CORPORATION, PETITIONER

v.

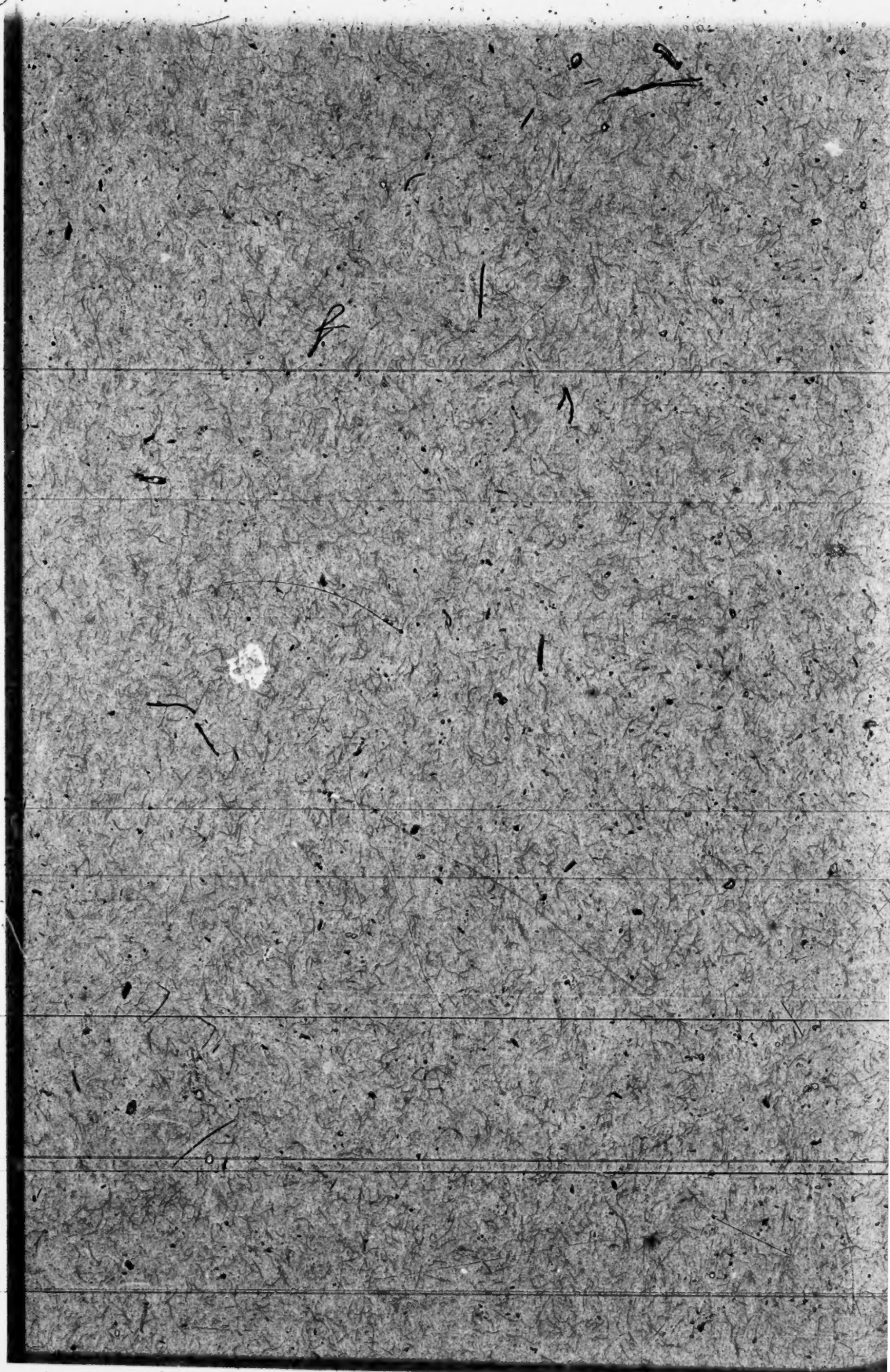
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
JERRIS LEONARD,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

STANLEY P. HEBERT,
General Counsel,
JULIA P. COOPER,
DAVID W. ZUGSCHWERDT,
Attorneys,
Equal Employment Opportunity Commission,
1800 G Street, N.W.,
Washington, D.C. 20506.



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OPINIONS BELOW

The opinion of the district court (Pet. App. A5–A18) is reported at 304 F. Supp. 33. The opinion of the court of appeals (Pet. App. A19–A21) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1970, and a petition for rehearing was denied on July 17, 1970. The petition for a writ of certiorari was filed on September 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission's demand for access to information, which the court of appeals upheld, was based on a valid charge of racial discrimination within the meaning of Section 706(a) of the Civil Rights Act of 1964.

STATUTE AND REGULATION INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2000e–15, and of the Equal Employment Opportunity Commission's Procedural Regulations, 29 C.F.R. 1601.1–1601.33, are set forth in the Appendix to this brief, *infra*, pp. 6–9.

STATEMENT

On July 19, 1967, a member of the Equal Employment Opportunity Commission filed with the Commission a charge of discrimination against the petitioner corporation stating that he had reasonable cause to believe that petitioner had violated Title VII by engaging "in the following unlawful employment practices: 1. Maintenance of racially restricted job classifications. 2. Discriminatory use of tests, restricting Negro employees to lower paying jobs. 3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs." [1]

Pursuant to Section 706(a) (*infra*, p. 6), the Commission proceeded to investigate the charge. After preliminary correspondence (see Pet. App. A6–A7), the company refused to produce certain information sought by the Commission. On August 15, 1968, the

[1] Pet. App. A1.

Commission issued a formal demand for access (Pet. App. A2–A4).

The company thereupon filed the present suit under Section 710(c) of the Act, seeking to set aside the Commission's demand on the grounds that, *inter alia*, the demand for access was based upon a charge that did not set forth sufficient facts under Section 706(a) and the Commission's regulations, and that the information sought in the demand would be unduly burdensome to supply.

The district court held that the Commissioner's charge failed to set forth the facts upon which it was based as required by Section 706(a) and, accordingly, set aside the Commission's demand. The court of appeals reversed, holding that the charge comported with the requirements of Title VII and noting that "* * * it is difficult to see what additional information the Commissioner should set forth as facts supporting his charge" (Pet. App. A21).

ARGUMENT

Equal Employment Opportunity Commission proceedings are informal; the Commission's enforcement tools are persuasion and conciliation. 42 U.S.C. 2000e–4(f), 2000e–5. A charge of discrimination filed by an employee is the principal method of invoking the Commission's powers of persuasion, although Section 706(a) also authorizes Commission members to file such charges so that employees who are deterred from filing by fear of retaliation can nevertheless keeping with the Act to import [as petitioner wishes] have their grievances aired. Thus, "it would be out of

common-law pleading niceties to this 'charge,' or in turn to hog-tie the subsequent lawsuit to any such concepts. All that is required is that it give sufficient information to enable EEOC to see what the grievance is about." *Jenkins v. United Gas Corp.*, 400 F. 2d 28, 30 n. 3 (C.A. 5).

In this case the Commission viewed the information supplied by the charge as sufficient. To be sure, a charge which recited only that the employer had violated Title VII, and nothing more, might not be adequate. But here the charge went significantly further (see *supra*, p. 2). Of course more could have been alleged, as it always can be, but the court of appeals correctly found the charge had gone far enough.

Petitioner contends that whether information sought by the Commission is relevant cannot be determined from this charge. But with respect to a charge essentially similar to the one involved here, a district court held that it had no difficulty in making such a determination, *Local No. 104, Sheet Metal Workers* v. *Equal Employment Opportunity Commission*, 303 F. Supp. 528 (N.D. Cal.), and the court of appeals in the present case reasonably reached the same result.[2] See, also, *Jenkins* v. *United Gas Corp., supra; Blue Bell*

[2] Even if the charge detailed specific instances of discrimination, the information sought by the Commission, which related to employment practices over a one-year period, would have been relevant because "[d]iscrimination on the basis of race * * * is *class discrimination*" and a pattern or practice sheds light on a specific event. *Georgia Power Co.* v. *Equal Employment Opportunity Commission*, 412 F. 2d 462, 468 (C.A. 5); accord, *Blue Bell Boots, Inc.* v. *Equal Employment Opportunity Commission*, *infra; Local No. 104, Sheet Metal Workers* v. *Equal Employment Opportunity Commission*, *supra*.

Boots, Inc. v. *Equal Employment Opportunity Commission*, 418 F. 2d 335 (C.A. 6). The few inconclusive fragments from the early floor debates cited by petitioner do not call for a different result.

There is no conflict of decisions among the circuits. In *United States* v. *Gustin-Bacon Div.*, 426 F. 2d 539, 543 (C.A. 10), petition for certiorari pending, No. 466, this Term, the district court's opinion in the present case was distinguished on the ground that a different section of Title VII was there involved.[3] But the decision in *Gustin-Bacon*, upholding the adequacy of the complaint in that case, is obviously consistent with, and indeed analogous to, the court of appeals' decision here.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General,
STANLEY P. HERBERT,
General Counsel,
JULIA P. COOPER,
DAVID W. ZUGSCHWERDT,
Attorneys,
Equal Employment Opportunity Commission.

[3] The court in *Gustin-Bacon* was interpreting 42 U.S.C. 2000e-6(a), which requires that a complaint by the Attorney General in a civil action set "forth facts pertaining to such pattern or practice" of discrimination.

APPENDIX

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C 2000e–2000e–15 (1964)

Section 706(a), 42 U.S.C. § 2000e–5(a):

> "(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, * * * has engaged in an unlawful employment practice, the Commission shall furnish such employer * * * (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. * * *

* * * * *

Section 709(a), 42 U.S.C. 2000e–8(a):

> (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of

examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

Section 710(a)-(d), 42 U.S.C. 2000e-9(a)-(d):

(a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

(b) If the respondent named in a charge filed under section 706 fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 709(a) * * * or if any persons fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the * * * demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

(c) Within twenty days after the service upon any person charged under section 706 of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 709(a), such person may file in the district court of the

United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this title or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

(d) In any proceeding brought by the Commission under subsection (b), except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

EEOC PROCEDURAL REGULATIONS, 29 C.F.R. §§ 1601.1–1601.33 (1970)

Section 1601.11, Contents; amendment, 29 C.F.R. 1601.11:

(a) Each charge should contain the following:

(1) The full name and address of the person making the charge.

(2) The full name and address of the person against whom the charge is made (hereinafter referred to as the respondent).

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practice.

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local authority charged with the enforcement of fair employment practice laws, and, if so, the date of such commencement and the name of the authority.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. * * *

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